



1 determines that the Magistrate Judge's Report and Recommendation (#79) entered on January 27,  
2 2015, should be adopted and accepted.

3       The Court finds it necessary to respond in some detail to Plaintiff's first objection, regarding  
4 the Magistrate Judge's inadvertent reference to the date of Plaintiff's termination as May 17, 2010,  
5 rather than the correct date May 17, 2011. Plaintiff argues that this is important because the Magistrate  
6 Judge referred to timing as one reason to find for Defendants on his retaliation claim. *See* Doc. #79  
7 at 8 ("Moreover, the evidence demonstrates that Plaintiff continued with the exhaustion process in his  
8 grievance related to the slip and fall well after the alleged retaliatory conduct that forms the basis for  
9 this claim occurred."). Plaintiff filed an informal grievance related to his slip and fall on June 3, 2010,  
10 his first formal grievance on August 5, 2010, and second formal grievance on September 15, 2010.  
11 He was subsequently fired on May 17, 2011. Plaintiff concedes that he did not exhaust his retaliation  
12 claim, but argues that he has a valid excuse: fear of further retaliation. Doc. #69 at 5. Ultimately, the  
13 Magistrate Judge held that the "Ninth Circuit has not held that administrative remedies are unavailable"  
14 such that exhaustion is excused based on fear of retaliation. Doc. #79 at 8. The Magistrate Judge  
15 added that this logic "would extend an exception to the exhaustion anytime an inmate alleges a  
16 retaliation claim." *Id.*

17       The Ninth Circuit has not expressly acknowledged an exception to the exhaustion requirement  
18 when a plaintiff fears retaliation for initiating a grievance. The leading Ninth Circuit cases to address  
19 excuses to the exhaustion requirement primarily identify situations in which official misconduct or  
20 omissions made filing a grievance effectively unavailable. *See Albino v. Baca*, 697 F.3d 1023, 1034  
21 (9th Cir. 2012) (finding no excuse absent "evidence that any jail official engaged in any misconduct  
22 that prohibited [plaintiff] from learning of or following the grievance procedure"); *Nunez v. Duncan*,  
23 591 F.3d 1217, 1224 (9th Cir. 2010) (finding excuse because plaintiff failed to exhaust "not through  
24 his own fault but by the Warden's mistake").

25       This district has recognized that the Ninth Circuit "has cited with approval holdings in other  
26 circuits in which actual or threatened retaliation could render the inmate's ability to access the

1 grievance process effectively unavailable.” *Farkas v. Gedney*, No. 2:14-cv-0415, 2014 WL 5782788,  
2 at \*2 (D. Nev. Nov. 6, 2014); *see also Maestas v. Legrand*, No. 3:10-cv-0585, 2012 WL 600838, at  
3 \*1 (D. Nev. Feb. 23, 2012). Indeed, the Ninth Circuit has cited *Turner v. Burnside*, 541 F.3d 1077,  
4 1085 (11th Cir. 2008), and *Macias v. Zenk*, 495 F.3d 37, 45 (2d Cir. 2007), as examples of cases by  
5 its “sister circuits” that adopted an excuse for exhaustion based on fear of retaliation. *Sapp v. Kimbrell*,  
6 623 F.3d 813, 822-23 (9th Cir. 2010); *Nunez*, 591 F.3d at 1224. However, the government is correct  
7 that the Ninth Circuit has not yet adopted such a rule, despite its references to other circuits. The Court  
8 agrees with the Magistrate Judge’s determination that such a rule should not be applied unless it is  
9 expressly adopted by the Ninth Circuit. In light of this finding, the mistake as to the year in which  
10 Plaintiff was fired was harmless because Plaintiff nonetheless failed to identify a valid excuse for his  
11 failure to exhaust.

12 IT IS THEREFORE ORDERED that the Magistrate Judge’s Report and Recommendation (#79)  
13 entered on January 27, 2015, is adopted and accepted, and Defendant’s Motion for Summary Judgment  
14 (#66) is GRANTED.


15 IT IS FURTHER ORDERED that Plaintiff’s Cross Motion for Summary Judgment (#69)  
16 DENIED.

17 IT IS FURTHER ORDERED that Plaintiff’s retaliation claim is DISMISSED without  
18 prejudice.

19 IT IS FURTHER ORDERED that JUDGMENT be ENTERED in favor of Defendants and  
20 against Plaintiff with respect to the Fourteenth Amendment equal protection claim and Eighth  
21 Amendment deliberate indifference claim.

22 IT IS SO ORDERED.

23 DATED this 25th day of February, 2015.

24   
25 LARRY R. HICKS  
26 UNITED STATES DISTRICT JUDGE